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## What Is Remembered

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# WHAT IS REMEMBERED

*Alice Ristroph*\*

POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM. By *Sarah A. Seo*. Cambridge and London: Harvard University Press. 2019. Pp. 275. \$28.95.

## INTRODUCTION

American criminal law has a history, a history not sufficiently known to lawyers, judges, and scholars.<sup>1</sup> This legal history is intertwined with the political and cultural history of the United States, parts of which are well known, but much of which is distorted by the myths that we tell of our own past.<sup>2</sup> The familiar stories include the glory of revolution and a truly democratic Founding, the shame of slavery followed by a bloody but necessary Civil War, and the nation's redemption through reassertion of democratic values in Reconstruction and the twentieth-century civil rights movement. Though criminal law does not figure prominently in the usual versions of any of these national tales, it was always there, sometimes fostering change

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1. For lack of a better adjective, I use "American" here and throughout this Review to designate people or practices characteristic of the United States. Of course, North and South America include other countries.

The history of U.S. criminal law may be insufficiently known to legal historians themselves. The classic surveys of American legal history have tended to focus on commercial or private law and to neglect criminal law. *See, e.g.*, GRANT GILMORE, *THE AGES OF AMERICAN LAW*, at xxi–xxii (2d ed. 2014) (noting the author's expertise in commercial law and relative inattention to criminal law); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at xii (1977) (noting the book's focus on private law). Meanwhile, influential book-length histories of American criminal law have tended to focus on a particular subnational jurisdiction in a relatively narrow time frame, rather than survey all of U.S. history à la Gilmore or Horwitz. *See, e.g.*, LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870–1910*, at 3 (1981); ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880* (1989). One notable exception, a panoramic survey of American criminal legal practices from the colonial period through the twentieth century, is LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* (1993).

2. *See* FRIEDMAN, *supra* note 1, at ix–x (describing the history as "baffling and immense; fragmented into a thousand pieces; unwieldy, stubborn; hidden in dark places and inaccessible corners"). I am not sure whether Americans embrace national myths more than any other nationality, but I think we must do it at least as much as any other nationality. *See* Mark J. Osiel, *Ever Again: Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 464 (1995) ("All societies have founding myths . . . . Some societies also have myths of re-founding. . . ." (emphasis omitted)).

and more often conserving existing power structures. We need to learn criminal law's history, and there is no time like the present.

There is also no time *but* the present that any of us can undertake this necessary historical study. Whatever scholars find in the past, we will view it with knowledge of American criminal law today—with knowledge of mass convictions achieved primarily through pleas rather than trials, substantial and enduring racial disparities, continuing high rates of lethal violence, and a general attitude of dissatisfaction and despair about this area of law. We cannot study criminal law's past without knowing of its present "crisis." And as historians have often observed, a sense of present crisis can produce temptation to invent a past more glorious—or more innocent, or more egalitarian, or more orderly—than the events that actually transpired.<sup>3</sup>

One challenge, then, is to learn criminal law's history without succumbing to nostalgia for a past that never existed.<sup>4</sup> As scholars began to perceive a crisis in American criminal law in the early years of the twenty-first century, a few early efforts at diagnosis were decidedly nostalgic, finding a lost golden age of criminal law somewhere in America's past and recommending ways we might restore aspects of that lost era.<sup>5</sup> Other studies of the present crisis have painted a much less flattering picture of criminal law past.<sup>6</sup> Into this growing literature arrives Sarah Seo's *Policing the Open Road: How Cars Transformed American Freedom*.<sup>7</sup> Seo has written previously of "the inescapable problem of seeing the past through our own biases,"<sup>8</sup> and she argues that a history of the arrival and promulgation of the automobile can yield new insights into contemporary legal realities. Traffic laws are at the border of criminal law, sometimes classified as civil and sometimes not, but they

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3. See, e.g., WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA*, at ix (1996) ("Every history bears the impress of its times. . . . One response to present crises is a rush to the past—a mythical American past.").

4. The very word *nostalgia* evokes an invented past rather than a historical one. The word combines the ancient Greek terms *nostos* (a return home) and *algos* (pain), but it was only in the late eighteenth century that the word was coined by a Swiss doctor who simply translated the German word for homesickness into something sounding more ancient. As a medical diagnosis, nostalgia originally named a sickness whose symptoms included a distorted and embellished view of the past. Neel Burton, *The Meaning of Nostalgia: The Psychology and Philosophy of Nostalgia*, PSYCHOL. TODAY (Nov. 27, 2014), <https://www.psychologytoday.com/us/blog/hide-and-peek/201411/the-meaning-nostalgia> [<https://perma.cc/XKX6-FV34>]. The fictions inherent in nostalgia sometimes disappear from present usage, though. Or, as the novelist Peter De Vries said, "Nostalgia ain't what it used to be." PETER DE VRIES, *THE TENTS OF WICKEDNESS* 6 (1959).

5. See STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

6. See, e.g., MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006); sources cited *infra* note 11.

7. Sarah A. Seo is an Associate Professor of Law at the University of Iowa College of Law.

8. Sarah A. Seo, *Antinomies and the Automobile: A New Approach to Criminal Justice Histories*, 38 LAW & SOC. INQUIRY 1020, 1021 (2013).

have become a major tool of criminal investigation. The ubiquity of traffic violations gives the police great power to stop and question nearly any driver they choose, and the police have used this power to investigate criminal activity entirely unrelated to driving. Seo argues that the Supreme Court endorsed these broad powers of enforcement at the first opportunity, developing constitutional doctrines that today allow police substantial discretion off the road as well as on it. Unfortunately, that discretion is used to target racial minorities and produce grave inequalities in American criminal law. *Policing the Open Road* begins with the policing of the automobile, but it ultimately seeks to illuminate the policing of persons outside of cars as well as in them.

One of the many virtues of this book is its effort to correct a specific type of nostalgia common among criminal procedure scholars—nostalgia for the Warren Court and its supposedly “revolutionary” efforts to discipline police officers. Seo tells an alternative story in which the Supreme Court, during Earl Warren’s tenure but also before and after, repeatedly interpreted the Fourth Amendment to endorse police discretion rather than to constrain it. In this sense, Seo helps us see canonical Supreme Court decisions as accommodations of police authority rather than pronouncements of revolutionary change.

But the book also offers its own story of revolution, or rather transformation: it claims that automobiles were a unique disruption in American life and American law; that “cars transformed American freedom”; and, most importantly for my purposes here, that the legal responses (legislative, executive, and judicial) to the automobile are the origins of modern regimes of racialized law enforcement. Collectively, one might call these claims a story of automobile exceptionalism. To evaluate this story, we need to know something about American life and law, and American policing in particular, before the arrival of the automobile. Though the nineteenth century is nearly absent from *Policing the Open Road*, histories of that era offer reasons to doubt that the arrival of the automobile expanded police discretion as much as Seo claims.

Seo’s transformation story is important because it posits discontinuity between racialized policing today and the forms of racial injustice that preceded the automobile. Moreover, the story of automobile exceptionalism embraces—perhaps unwittingly—what some scholars have termed “the penology of racial innocence,” or an assumption that the institutions of criminal law, and the elites who occupy and direct those institutions, are innocent of racial bias unless proven otherwise.<sup>9</sup> According to this book, the enabling of racialized law enforcement was accidental and unintended, the unforeseen result of good-faith efforts to address the substantial, unprecedented, and non-race-related problems of mass automobility. This is a story of how judg-

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9. Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 LAW & SOC’Y REV. 695 (2010).

es licensed racialized policing, told in a manner that will give the least offense possible to the legal elites who argued for and crafted that doctrine.

History gives us both change and continuity, and the historian has considerable leeway to decide which to emphasize in any specific context. But the leeway is not unlimited, and even within the zone of plausible interpretations, there are consequences to a scholar's interpretive choices. Like nostalgia or amnesia, a transformation narrative can serve ideological functions.<sup>10</sup> Narratives of transformation have been especially prominent in the context of racial inequality, as each generation imagines itself free of the sins of earlier eras.<sup>11</sup> In the academy and outside of it, legal elites and others in positions of power tell many stories of transformation but give insufficient attention to continuities in racial injustice, especially with regard to criminal law. Some of the most important recent critiques of American criminal law have tried to refresh our collective recollections by emphasizing the continuities between past and present forms of racial subordination.<sup>12</sup> The story of judicial accommodation of enforcement discretion in *Policing the Open Road* is a key contribution to our understanding of the origins of the carceral state, but it is the story of one step along a journey that began much earlier than the twentieth century. The other story of this book—the tale of policing transformed by the automobile—may tempt some readers as an antidote to difficult histories of unrelenting racial oppression, but readers should resist the temptation.

This Review develops these themes. Part I introduces Seo's engaging story of the arrival of the automobile. That story offers a rich analysis of several aspects of American life and law in the twentieth century, but it is not, I argue, a reliable overview of policing, not even within its chosen time frame. Part II examines some key continuities between the nineteenth century and the twentieth. It is striking how often accounts of *nineteenth-century* policing emphasize the very developments that Seo traces to the twentieth-century arrival of the automobile (such as pervasive regulations that made widespread lawbreaking inevitable, broad enforcement discretion, and patterns of selective enforcement along race and class lines). It is striking how blatantly criminal law was used as a tool of racial domination after the Civil

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10. See Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003).

11. See Katie R. Eyer, *The New Jim Crow Is the Old Jim Crow*, 128 YALE L.J. 1002 (2019) (reviewing ELIZABETH GILLESPIE McRAE, *MOTHERS OF MASSIVE RESISTANCE: WHITE WOMEN AND THE POLITICS OF WHITE SUPREMACY* (2018), and JEANNE THEOHARIS, *A MORE BEAUTIFUL AND TERRIBLE HISTORY: THE USES AND MISUSES OF CIVIL RIGHTS HISTORY* (2018)).

12. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed. 2012); DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008); KELLY LYTLE HERNÁNDEZ, *CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965* (2017); KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010); 13TH (Forward Movement & Kandoo Films 2016).

War and into the twentieth century—entirely independently of traffic offenses. Given these continuities, Part III suggests that the car may be, after all, just a vehicle: it did not itself transform policing to the extent that Seo suggests, but it did bring the phenomenon of police discretion to the Supreme Court for the first time. Seeing police discretion only in the specific context of automobility (perhaps), the Court gave it a constitutional green light.<sup>13</sup> Part IV offers concluding reflections on the need to learn more of criminal law's history, and on the practical lessons for today that can be drawn from this book.

#### I. AUTOMOBILE EXCEPTIONALISM

*Policing the Open Road* begins its chronology at the dawn of the twentieth century, with the mass production of the automobile. Around 1914, Ford Motor Company adopted a moving assembly line (p. 1). Other companies also established mass production around the same time, and the impact was huge: the number of registered passenger cars in America went from less than half a million in 1910 to nearly eighteen million by 1925 (p. 8). According to Seo, all these cars “radically changed daily lives and aspirations, culture and the built environment, and people’s relationships with each other and their communities. . . . [T]he automobile came to represent individual solitude and freedom” (pp. 9–10). The cultural history of the arrival of the automobile is a fascinating story that Seo tells with wit and flair. The romance and the allure of the road may not be recognizable to every American today, especially urbanites, but the societal embrace of the automobile is a good reminder of how big this country is. It contained, and still contains, wide-open spaces. The ability to cross those spaces and move within them as one likes is hardly the only thing that Americans have called freedom, but it is surely one important version of it.<sup>14</sup>

If the open road is freedom, what is a traffic jam, or an auto accident? With mass automobility came “death and mayhem” (p. 24), “mass chaos that threatened everyone’s safety” (p. 12). Seo’s first two chapters develop her claims of automobile exceptionalism. Cars created unprecedented threats to public safety, which necessitated an unprecedented regulatory response. Governments enacted “laws and more laws” to address the dangers of the automobile (p. 26), but they then encountered another supposedly unprecedented difficulty: ubiquitous lawbreaking (p. 31). In the first chapter, Seo introduces a figure that will reappear throughout her book: the “normally law-

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13. Though much of Seo’s effort to show what the makers of Fourth Amendment doctrine were thinking is compelling, I have some doubt that the early- and mid-twentieth-century Supreme Court was as blind to racialized policing as Seo suggests. See *infra* Part III.

14. “[T]he concept of freedom . . . encompass[es] so many diverse meanings that one begins to wonder if ‘freedom’ really has any bite to it. . . . [The many examples of] the contestability and malleability of freedom actually suggest that the concept is vacuous.” Michael J. Klarman, *Rethinking the History of American Freedom*, 42 WM. & MARY L. REV. 265, 266 (2000) (reviewing ERIC FONER, *THE STORY OF AMERICAN FREEDOM* (1998)).

abiding citizen[]” who nonetheless violates the law (p. 31). “More than any other technology, the automobile had enlarged perceptions of the self” (p. 35), and self-regarding, aggressive, reckless drivers simply could not be counted upon to regulate themselves as did the supposedly more disciplined citizens of the nineteenth century (pp. 38–39). Careful experts such as Yale law professor Underhill Moore studied the problem and discovered that “policing made a difference in encouraging lawful behavior” (p. 57). Chapter Two traces the development of the modern police force to August Vollmer, head of the Berkeley Police Department from 1905 to 1932 (p. 66). Vollmer envisioned police as fighters of serious crime and didn’t want them to have responsibility for traffic enforcement, but he eventually resigned himself to the fact that they would have both roles (p. 76). Against an earlier conception of the police officer as brutal, incompetent, or corrupt, Vollmer advocated for a vision of police that would come to dominate across the country: uniformed and courteous professionals, trained in specialized academies, skilled in various forensic technologies, and able to address problems of traffic and real crime alike (p. 68). All of this, Seo suggests, transpired thanks to the car.<sup>15</sup>

The expansion of policing brought constitutional challenges, as traced in the book’s next four chapters, but the Supreme Court did not do much to constrain the police response to automobility. Instead of requiring police to obtain warrants before stopping (or searching) an automobile on the roadway, the Court adopted a framework that allowed police to make auto stops (and searches) whenever officers had probable cause to suspect criminal activity. It adopted a broad concept of “probable cause” that allowed police wide discretion, and it continued to endorse this discretion with regard to car stops and searches for decades afterward. There are many important insights in Seo’s nuanced account of Fourth Amendment doctrine and the men who made it, as I discuss in Part III. For now, my focus is Seo’s own automobile exceptionalism. In her effort to illustrate the mindset of the judges and political leaders who crafted the legal response to automobility, Seo seems to have adopted many aspects of their views herself. She makes three descriptive claims of interest: (1) the car made pervasive regulations necessary in a nation that had previously relied primarily on self-regulation;<sup>16</sup> (2) these new regulations led to a new phenomenon of ubiquitous lawbreaking, including by “respectable” people;<sup>17</sup> and (3) this epidemic of lawbreaking required a system of law enforcement—police with discretionary power—not previously known to the United States.<sup>18</sup>

As noted, history typically gives us both continuity and discontinuity, and the historian chooses what to emphasize. The emphasis on automotive disruption and legal discontinuity in *Policing the Open Road* is a choice, not

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15. E.g., p. 112.

16. E.g., p. 63.

17. E.g., pp. 26–27.

18. See, e.g., p. 112.

a dictate of the historical record. As the next Part will argue, nineteenth-century histories offer ample evidence of pervasive regulation, ubiquitous lawbreaking, and police discretion—along with a seemingly perpetual perception of a need for reform, for more and better enforcement. The twentieth-century proliferation of the automobile provided many occasions for these phenomena to continue, but it did not introduce them. It matters which way we tell the story, because the choices we make about criminal law in the twenty-first century will depend on our account of when and how criminal law's problems originated. Indeed, the shape and direction of reform will depend on whether we see discretionary, racialized policing as a curable illness of relatively recent vintage, or rather as an intrinsic feature of criminal law that has been here all along.

## II. THE MISSING NINETEENTH CENTURY

As noted above, *Policing the Open Road* begins in the early twentieth century and argues that the automobile brought radical changes to American life and, eventually, to law. The nineteenth century serves as an occasional foil, but typically in a quick and conclusory assertion that does not provide much context to evaluate the claimed distinction.<sup>19</sup> A book solely about cars could omit the nineteenth century, perhaps, since cars were still a rarity at the end of that century. But a study of either policing or race in the early twentieth-century United States should address the nineteenth century in far more detail than does *Policing the Open Road*. This Part looks first at policing, then at the use of criminal law as an instrument of racial control, and suggests that Seo has overstated the transformative impact of the automobile on each.<sup>20</sup>

With some regularity, scholars have dated the “modern” police force to the nineteenth century.<sup>21</sup> Seo adopts a slightly different time frame, writing,

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19. See, e.g., pp. 13, 68.

20. For recent projects unrelated to this Review, I have been deeply immersed in histories of American criminal law. See Alice Ristroph, *Farewell to the Felony*, 53 HARV. C.R.-C.L. REV. 563 (2018) [hereinafter Ristroph, *Farewell to the Felony*]; Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949 (2019) [hereinafter Ristroph, *Intellectual History*]. I should note that since Seo is a historian by training and I am not, professional good sense might counsel against a challenge to her account. But Seo's original historical research is focused on the twentieth century; she supports the little she says about the nineteenth century with citations to a few secondary sources. I do not think the sources she cites regarding the nineteenth century support her claims, as explained below. I would not want to referee an argument among historians about who gets the nineteenth century right. At a minimum, though, existing police histories present ample reason for skepticism that the automobile brought the particular changes that Seo identifies, at least until Seo tells us why other historians of policing are wrong.

21. See, e.g., ROBERT M. FOGELSON, *BIG-CITY POLICE* 13 (1977) (claiming that by the mid-nineteenth century, “most American cities had more or less resolved the cardinal issues of policing in ways that were not only consistent with the country's traditions and ideology but also incipient in the institution's origins and early development”); SIDNEY L. HARRING, *POLICING A CLASS SOCIETY: THE EXPERIENCE OF AMERICAN CITIES, 1865–1915*, at 3 (2d ed.



"[t]o be sure, in the nineteenth century, big cities like Philadelphia, New York, and Boston had formed police departments that focused on crime prevention and law enforcement. But the transformation of the police into its modern version is a twentieth-century story that happened in urban centers as well as in smaller towns" (p. 68). The question, then, is what counts as "the modern version" of police. Certainly, if modern police are those that enforce traffic offenses, then the book's claim that the automobile created the modern police is true, but tautological. Seo seems to mean something else by "the modern version." She emphasizes that the problems of automobility led to pervasive regulations, broad enforcement discretion, regular interactions between police and ordinary individuals, and eventually, opportunities for racialized enforcement.<sup>22</sup> In actuality, each of these developments emerged well before the automobile.

Before the automobile brought traffic regulations, how did the police occupy their time? They responded to and investigated reported crimes; they broke up disputes and tried to prevent or quell riots; they provided a range of social services; and more than anything else, they patrolled the streets, looking for people out of place or signs of criminality or disorder in general.<sup>23</sup> These police forces did not have automotive regulations to enforce, but they did not need such regulations to exercise a general authority to patrol—and to stop, question, and sometimes arrest persons they found suspicious. This is partly because no constitutional or subconstitutional legal regime had yet developed that could restrain officers' authority to make such interventions and partly because nineteenth-century law did in fact impose

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2017) (tracing the "modern form" of the police to "class struggle under industrial capitalism," and arguing that "we now have essentially the same police institution that evolved" in the late nineteenth century); ROGER LANE, *POLICING THE CITY: BOSTON 1822–1885* (1967); ERIC H. MONKKONEN, *History of Urban Police*, 15 CRIME & JUST. 547, 549–50 (1992) (distinguishing "the new police as created in the United States in the nineteenth century" from the largely volunteer or amateur systems of night watch and constables that preceded them).

22. See p. 8 ("Unforeseen by midcentury jurists, their solution to the potential arbitrary policing of everyone led directly to the problem of discriminatory policing against minorities."); p. 27 ("The proliferation of traffic laws had turned everyone who drove a car into a lawbreaker."); p. 89 ("By directing officers to be considerate of the general motoring public but not the criminally suspect, the mandate of courtesy implicitly acknowledged the police's increasingly discretionary authority to discern the difference between the two.").

23. See generally DAVID R. JOHNSON, *POLICING THE URBAN UNDERWORLD: THE IMPACT OF CRIME ON THE DEVELOPMENT OF THE AMERICAN POLICE, 1800–1887* (1979) (discussing each of the police functions listed above); see also STEINBERG, *supra* note 1, at 121–23, 166–67, 172; ROGER LANE, *Urban Police and Crime in Nineteenth-Century America*, 15 CRIME & JUST. 1, 9 (1992) ("The men on the beat gave directions, unsnarled traffic, returned lost children, aided victims of sudden accident, and escorted drunks either to the station house or home."); *id.* (listing other police functions, including providing food and lodging to the homeless and overseeing a variety of municipal licenses such as those for hackney drivers or liquor dealers); MONKKONEN, *supra* note 21, at 550 (explaining how hierarchical organization and technological developments enabled the police to become more responsive to citizen reports of crime). Seo cites the Johnson and Steinberg books but does not discuss either work in any detail. See p. 283 n.20.

fairly extensive restrictions on ordinary citizens.<sup>24</sup> Well before national Prohibition, an array of detailed but widely disobeyed alcohol-related state regulations meant that police were likely to encounter lawbreakers wherever they went.<sup>25</sup> Breach of peace, disorderly conduct, vagrancy, and regulatory violations provided other grounds for police intervention.<sup>26</sup> In the nineteenth century, as now, most arrests were for misdemeanors rather than felonies, which may have reflected a deliberate enforcement strategy.<sup>27</sup> Indeed, the police-to-citizen contact of pre-automotive foot patrols, with its focus on order maintenance to prevent more serious crime, was one inspiration for the “Broken Windows” policing strategy championed by James Wilson and George Kelling in the 1980s.<sup>28</sup>

Seo is a nuanced and careful writer, and she often acknowledges some evidence of continuity before coming down on the side of discontinuity. For example, she writes, “Even in the nineteenth century, at least in denser urban areas, local ordinances had regulated traffic . . . . Many towns and cities . . . delegated traffic management to the police . . .” (pp. 24–25). But she then goes on to state that “[e]ven in the cities, the flow of movement on streets and highways was largely self-regulated,” and then contrasts purported self-regulation in the nineteenth century with the proliferation of automotive regulations in the twentieth century (pp. 25–26). “Suddenly, misdemeanors became mainstream. . . . The proliferation of traffic laws had turned everyone who drove a car into a lawbreaker” (pp. 26–27). Of course, as described in the previous paragraph, misdemeanors unrelated to traffic had been mainstream long before the arrival of the automobile.

24. For example, “arrests on suspicion”—that is, for general suspiciousness without a particular crime in mind—were common in the nineteenth century, and for decades into the twentieth. See WILBUR R. MILLER, *COPS AND BOBBIES: POLICE AUTHORITY IN NEW YORK AND LONDON, 1830–1870*, at 57–59 (1977); STEINBERG, *supra* note 1, at 180; William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960). Writing for the Supreme Court, Justice Douglas noted in 1972 that arrests on suspicion were unconstitutional, even as he reported the frequency of such arrests over the prior three years. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169 & n.15 (1972).

25. See, e.g., STEINBERG, *supra* note 1, at 121–22.

26. *Id.* at 121–23.

27. See JOHNSON, *supra* note 23, at 126 (“Since popular opinion held that certain kinds of behavior eventually caused serious crimes, it was important to curb minor offenses before they led to more consequential ones.”); Ristroph, *Farewell to the Felony*, *supra* note 20, at 568–69 (discussing the volume of misdemeanor arrests today).

28. George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> [<https://perma.cc/YS96-A5WH>]. In sharp contrast to Seo’s account of automobility, Wilson and Kelling argued that the automobile had transformed policing (for the worse) by ending regular contacts between police and the communities they patrolled. See *id.* Police historian Samuel Walker questioned whether the automobile alone could be blamed for that development, emphasizing the telephone and two-way radio as other transformative technologies, but Walker agreed that “[i]n the days of foot patrol, officers had extensive casual contacts with people.” Samuel Walker, “Broken Windows” and Fractured History: *The Use and Misuse of History in Recent Police Patrol Analysis*, 1 JUST. Q. 75, 80 (1984).

On traffic regulation, or on all forms of regulation writ large, there may be a range of plausible interpretations that allow a scholar leeway to emphasize either continuity or discontinuity.<sup>29</sup> On other issues, though, Seo elects to claim discontinuity even when she must look past historical evidence to do so. For example, she repeatedly makes the claim that before automobiles, police did not come into contact much with mainstream, ordinary citizens, and she repeatedly supports this claim by describing pre-automotive policing as focused on “vagrants.”<sup>30</sup> She even introduces the phrase “nonvagrant individuals” as an alternative way of describing the ordinary citizens supposedly not subject to police contacts before the automobile (p. 144). Seo thus essentializes the concept of a vagrant, treating it as a prelegal category rather than a construction of criminal law and an opportunity for enforcement discretion.<sup>31</sup> This is surprising, given that vagrancy has long been recognized as the paradigmatic example of an offense defined so vaguely as to give enforcers near-unlimited discretion.<sup>32</sup>

It was not traffic offenses that made lawbreaking near ubiquitous, nor was it traffic that first brought the police into contact with “ordinary,” “respectable,” or seemingly “law-abiding” citizens. Writing of the late nineteenth century, Sidney Harring argues that “[t]he transformation of the American urban police institution from a small watch force to a full-scale, militarized, day-and-night force made possible a ‘policed society’—that is, a society in which state power could be used on a daily basis to regulate social

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29. See p. 282 n.16 (discussing divergent interpretations in NOVAK, *supra* note 3, and Harry Scheiber’s review of that book, Harry N. Scheiber, *Private Rights and Public Power: American Law, Capitalism, and the Republican Polity in Nineteenth-Century America*, 107 YALE L.J. 823 (1997) (book review)).

30. Along with vagrants, Seo depicts nineteenth-century policing as focused on prostitutes, p. 13, loiterers, p. 142, “and other suspicious persons,” p. 143, rather than the “ordinary” people who drove cars, p. 33. She does not herself emphasize the nineteenth-century policing of alcohol, but does quote Jerome Hall’s 1952 observation that police often made arrests as a way of dealing with “vagrants, drunkards, and derelicts.” P. 170. This array of offenses (and the category “suspicious persons”) should make obvious that the regulation of automobile traffic was not necessary to give the police broad discretion over ordinary people, especially the poor.

31. Risa Goluboff discusses at length law enforcers’ awareness and exploitation of the discretion afforded by vagrancy law. RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S* (2016). Seo suggests that the manipulation of vagrancy law by enforcement officials was an innovation prompted by, or at least coincident with, the arrival of the automobile. See p. 208. But as Goluboff notes briefly and as others have documented at greater length, even before the Civil War and especially in its immediate aftermath, the discretion afforded by vagrancy statutes was widely used as a tool of racial subordination. See BLACKMON, *supra* note 12; GOLUBOFF, *supra* at 115–16.

32. See, e.g., GOLUBOFF, *supra* note 31; Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956). Having mentioned the etymology of *nostalgia*, see *supra* note 4, I note also that some wordsmiths trace *vague* and *vagrant* to a common etymological root: the Latin *vagari*, to wander or stroll about. See, e.g., *Vagrant*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/vagrant> [<https://perma.cc/QP2R-F5B6>].

behavior.”<sup>33</sup> Of course, in the nineteenth century as in the twentieth and twenty-first, this broad state power was not actually wielded against all individuals. As David Johnson writes, the nineteenth-century police “had not been created to deal with *all* criminals, however; just some of them. This meant that specific groups had to be identified as the proper objects of police attention.”<sup>34</sup> Class and social rank, often determined by dress, defined the usual suspects. “Respectability shielded even those persons who had in fact violated the law, regardless of whether the offense was a minor one like drunkenness or a crime such as fraud. . . . [The privileged] were less subject to police scrutiny, and . . . if caught, they received more consideration than less fortunate people.”<sup>35</sup> Seo does report one 1898 incident in which a respectable Los Angeles businessman, a “nonvagrant individual,” protested police interference with him and his employees and customers (p. 144). The respectable gentleman complained to the mayor and board of police commissioners, but they found “nothing very serious had been proven” (p. 144). Seo interprets this 1898 incident as a mark of a changing society that would soon be still more radically transformed by the automobile, but again, histories of policing provide ample evidence that police had to choose who to bother—and encountered resistance when they bothered the powerful—from the first days that police forces existed.

In the nineteenth century, the frequency of police encounters with members of the public, respectable and unrespectable alike, led to calls for increased professionalization and courtesy, two more developments that Seo presents as twentieth-century products of automobility. In fact, in their earliest manifestations, patrolmen were urged to be “gentlemanly” on the theory that “[t]he average citizen would be more inclined to accept a police whose members acted according to the rules of polite society.”<sup>36</sup> The push to get police officers to wear uniforms was, like courtesy, a nineteenth-century effort. Seo suggests this effort ultimately succeeded thanks to the dangers of traffic patrol (p. 95), but other scholars report that most urban policemen were uniformed by the 1890s.<sup>37</sup> August Vollmer may have thought he was being revolutionary in bringing uniforms to Berkeley after taking charge in 1905, but neighboring San Francisco put its officers in uniform in the 1850s.<sup>38</sup> In pointing out these developments, I do not mean to obscure the many waves of reform efforts in American policing over the decades, and I have not tried to determine whether calls for professionalization were more

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33. HARRING, *supra* note 21, at 149.

34. JOHNSON, *supra* note 23, at 122 (emphasis omitted).

35. *Id.* at 124; *see also* HARRING, *supra* note 21.

36. JOHNSON, *supra* note 23, at 92–93; *see also* STEINBERG, *supra* note 1, at 122 (“Public intoxication was really the offense over which the police exercised authority. The majority of people who became drunk in public places were poor and working people . . .”).

37. FOGELSON, *supra* note 21, at 15.

38. David A. Johnson, *Vigilance and the Law: The Moral Authority of Popular Justice in the Far West*, 33 AM. Q. 558, 582 (1981).

prominent in the nineteenth or twentieth century.<sup>39</sup> Nonetheless, it is clear that police and ordinary citizens came into frequent contact, thus producing calls for more professional and courteous officers, as soon as there were police officers.

American police have always had a great deal of discretion.<sup>40</sup> Indeed, the word “police,” to nineteenth-century Americans, was an adjective used to describe a state’s broad prerogative to regulate as it saw fit for the general welfare, through either criminal or civil laws as the state chose.<sup>41</sup> Remarkably, the expansive literature on this general, not-specifically-criminal “police power” and the also substantial literature on police (officers’) discretion have mostly assumed that they are talking about different things, but the very label *police* for organized law enforcement agencies came from the concept of police as an all-purpose power to govern.<sup>42</sup> When we understand police (as in law enforcement agencies) in this historical light, it is hardly surprising to see them possessing wide discretion from their earliest stages. And just as the word police has multiple but related meanings, so too does the word discretion. Discretion—in the sense of being discreet, of knowing to stay quiet when inaction is preferable to action—was seen as a necessary virtue of the nineteenth-century officer.<sup>43</sup> But the need to be discreet in this sense arose precisely because police in that era had so much discretion in the sense we

39. See, e.g., ERIC H. MONKKONEN, *POLICE IN URBAN AMERICA, 1860–1920*, at 148 (1981) (noting that policing underwent “periods of innovation” in the middle of the nineteenth century and again in the 1890s); *id.* at 153–54 (discussing the nineteenth-century “police professionalization movement”); DAVID ALAN SKLANSKY, *DEMOCRACY AND THE POLICE* 53–54 (2008) (addressing “professionalism” in twentieth-century reform).

40. A few historians emphasize that the focus on investigating crime, which may seem a path toward constraining discretion, actually necessitated selective enforcement by inducing reliance on informants. See, e.g., JOHNSON, *supra* note 23, at 186; Lane, *supra* note 23, at 10–11.

41. See generally MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* (2005); NOVAK, *supra* note 3.

42. DUBBER, *supra* note 41, at xiv, 64. Seo connects the same concept of “[t]he police power” to the powers of police departments and officers, but she locates this connection in the response to automobility. P. 12.

43. See, e.g., JOHNSON, *supra* note 23, at 92 (noting “widespread agreement” that qualities of a good police officer included “courage, moderation, intelligence and great discretion” (quoting *Irish Policemen.*, CHI. TRIB., Feb. 3, 1858, at 17)); see also *id.* at 123 (discussing “patrolman’s innate sense of discretion”). To emphasize, the need to be discreet to accommodate the demands of “law-abiding citizens” was not the only sense in which the nineteenth-century officer had discretion; Johnson also describes the same kind of enforcement prerogative that is the focus of contemporary discussions of police discretion.

Patrolmen in the United States would have far more discretionary power than their British counterparts. The structure of American policing encouraged officers to ignore the standards of conduct dictated by legal strictures because they would not be required to apply the law to the urban underworld; they would only be asked to cope with crime by whatever means they found expedient. Nineteenth-century policemen therefore evolved subtly intertwined policies of violence and tolerance as the best ways to meld the expectations of law-abiding citizens and the special capacities of the underworld.

*Id.* at 184–85 (footnote omitted).

use that term today—discretion as the prerogative to act or not act. Discretion just is part of policing, and it always has been.<sup>44</sup>

A few other things happened in the nineteenth century that are not necessarily relevant to a study of automobiles but are certainly relevant to a study of the selective, racialized enforcement of low-level offenses. For more than half of that century, slavery continued in southern states. After the Civil War, white Americans in former slave states sought other means to preserve racial hierarchy and to continue to profit from the labor of black people. Criminal law, especially the crime of vagrancy, proved a very effective mechanism to replicate the basic forms of slavery for nearly a century after the Civil War. Consider the opening paragraphs of Douglas Blackmon's history of convict leasing, situated at almost exactly the same moment as the opening of Seo's book.

On March 30, 1908, Green Cottenham was arrested by the sheriff of Shelby County, Alabama, and charged with "vagrancy."

Cottenham had committed no true crime. Vagrancy, the offense of a person not being able to prove at a given moment that he or she is employed, was . . . dredged up from legal obscurity at the end of the nineteenth century by the state legislatures of Alabama and other southern states. It was capriciously enforced by local sheriffs and constables, adjudicated by mayors and notaries public . . . and, most tellingly in a time of massive unemployment among all southern men, was reserved almost exclusively for black men. Cottenham's offense was blackness.

. . . Cottenham was found guilty in a swift appearance before the county judge and immediately sentenced to a thirty-day term of hard labor. Unable to pay the array of fees assessed on every prisoner . . . Cottenham's sentence was extended to nearly a year of hard labor.

The next day, Cottenham . . . was sold [to a mining company which would] pay off Cottenham's fine and fees.<sup>45</sup>

The practice of convict leasing was itself illegal under federal law, but it continued across the South from soon after the Civil War until World War II, when it was finally dismantled by, yes, criminal enforcement.<sup>46</sup> The federal government finally began to prosecute aggressively the companies and individuals who continued to hold blacks in involuntary servitude, as well as the sheriffs or other local officials who operated the system. It took some years to end convict leasing, but by the time the war was over, the Nazi regime had

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44. See MILLER, *supra* note 24, at 45–73 (discussing the intrinsic place of discretion in policing and the specific forms of that discretion in London and New York).

45. BLACKMON, *supra* note 12, at 1–2 (footnote omitted).

46. President Roosevelt realized that the nation would need black soldiers as well as white ones, and he realized too that the continued forms of slavery (which had long been known to but ignored by the federal government) would compromise the country's reputation internationally and impede the war effort. See *id.* at 377.

given Americans a new discomfort with openly racial ideologies. Postwar racial oppression would have to take a different form.<sup>47</sup>

Convict leasing was rarely mentioned by criminal law scholars when Blackmon won a Pulitzer Prize for *Slavery by Another Name*. There is still surprisingly little discussion of this practice in criminal law scholarship, even among a wealth of new studies of low-level offenses and the opportunities for discriminatory enforcement they create.<sup>48</sup> This inattention may be a manifestation of what some historians have called Southern exceptionalism, a device as useful as nostalgia or amnesia to absolve a nation of responsibility for racial injustice. Southern exceptionalism allows an account of American history “as an epic showdown between the retrograde South and a progressive nation.”<sup>49</sup> With regard to criminal law in particular, the South has been the bucket into which we’ve dumped any memory of racial brutality.<sup>50</sup> We can always find some evidence of either distinctiveness or consistency across the nation’s geographic regions, just as we can find both types of evidence across time. But the distinctiveness has been exaggerated, with regard to both region and time. Long before the arrival of the automobile, white Americans across the country knew that criminal law could be used for purposes of racial subordination.<sup>51</sup>

### III. JUST A VEHICLE

So far, I have emphasized continuity rather than discontinuity to question Seo’s claim that cars brought radical changes to the law, lawbreaking, and policing. A sympathetic reader aware of Seo’s considerable talents as a

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47. *Id.* at 379–82.

48. Goluboff focuses her recent history of vagrancy on the 1960s, but does include a brief discussion of the nineteenth-century use of vagrancy law “to return black Americans to a state as close to slavery as legally and practically possible.” GOLUBOFF, *supra* note 31, at 116. Happily, some recent critiques of American criminal law take an explicitly historical approach, see sources cited *supra* note 12, and among these works are efforts to understand how convict leasing contributed to the present use of criminal law as a tool of racial subordination, see, e.g., James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465 (2019).

49. Matthew D. Lassiter & Joseph Crespino, *Introduction: The End of Southern History*, in *THE MYTH OF SOUTHERN EXCEPTIONALISM* 3, 5 (Matthew D. Lassiter & Joseph Crespino eds., 2010).

50. See Heather Ann Thompson, *Blinded By a “Barbaric” South: Prison Horrors, Inmate Abuse, and the Ironic History of American Penal Reform*, in *THE MYTH OF SOUTHERN EXCEPTIONALISM*, *supra* note 49, at 74.

51. Blackmon’s remarkable account should be paired with Khalil Gibran Muhammad’s study of nationwide constructions of black criminality. Blackmon explains how after the Civil War, “every southern state enacted an array of interlocking laws essentially intended to criminalize black life.” BLACKMON, *supra* note 12, at 53. Muhammad presents detailed evidence that beginning in the 1890s, white writers determined to prove black inferiority used crime statistics, and highly contestable interpretations of them, to cultivate a nationwide view among white Americans that blacks were inherently violent and deviant. See, e.g., MUHAMMAD, *supra* note 12, at 50–55.

historian of twentieth-century legal thought must then wonder how cars came to claim such a prominent role in her study.<sup>52</sup> One possibility is that the book is not designed as a history of policing but is instead a narrower study of Fourth Amendment doctrine, which barely existed before the twentieth century and which came of age with the automotive. When *Policing the Open Road* moves from the road to the courthouse, the book offers its greatest contributions. It shows how burgeoning ideas of privacy were used to raise Fourth Amendment challenges to police searches of cars.<sup>53</sup> It shows how judges struggled with those claims, sympathetic to the “ordinary” and “respectable” Americans who protested policing, and yet also concerned about the needs of law enforcement (Chapters Three and Four). It shows how the ordinary and respectable driver—“Everyman,” in Seo’s terminology and sometimes the Court’s—was implicitly assumed to be white (Chapters Four, Five, and Six).<sup>54</sup> It shows how judges, again and again, resolved the tension between Everyman’s freedom and law enforcement needs in favor of police discretion, adopting a view of probable cause that places almost no constraint on police authority (Chapters Four and Five). And the book shows, with eloquence and power, how that choice to license discretion has left minorities targeted by racialized enforcement without constitutional recourse (Chapter Six).

These are important observations that illuminate the development of Fourth Amendment doctrine. Notably, though, Seo ultimately combines her analysis of these doctrinal developments with her thesis of automobile exceptionalism to conclude that the constitutionalization of racialized policing was all a big accident, a failure of foresight rather than a deliberate endorsement of racial oppression: “[T]he social and legal developments that made the systematic policing of minorities possible did not originate with an intention to do so,” but was instead a response to “the immediate imperative to regulate the motoring public” (p. 7). Without claiming that psychological detective work can resolve definitively the question of institutional or judicial intent, we should note two features of the Supreme Court’s constitutional criminal procedure jurisprudence that, at the very least, raise doubts about Seo’s interpretation. First, the Court itself did not embrace the concept of automotive exceptionalism nearly so much, or so early, as Seo suggests. Indeed,

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52. See Seo, *supra* note 8; Sarah A. Seo, *Democratic Policing Before the Due Process Revolution*, 128 YALE L.J. 1246 (2019).

53. *E.g.*, chapter 3.

54. Nancy Leong made a comparable yet distinct argument several years ago. See Nancy Leong, *The Open Road and the Traffic Stop: Narratives and Counter-Narratives of the American Dream*, 64 FLA. L. REV. 305, 309 (2012) (“[T]he open road narrative is racialized as white, while the traffic stop narrative is racialized as non-white.”); *id.* at 321 (“[O]ur paradigmatic road warriors are almost exclusively white.”). Leong’s analysis focuses on contemporary America, not the early years of Fourth Amendment doctrine. In contrast, Seo argues that for the Supreme Court in the first half of the twentieth century, the paradigmatic driver was implicitly assumed to be white—both while pursuing freedom on the road and after being stopped by the police. See, *e.g.*, p. 15.



it did not use the phrase “automobile exception” until 1971, and then only to question whether such an exception was really part of Fourth Amendment law.<sup>55</sup> Second, as the Court developed the purportedly color-blind Fourth Amendment doctrines that are the subject of this book, it also heard and decided cases in other areas of constitutional criminal procedure. In the Court’s Fifth, Sixth, and Fourteenth Amendment criminal procedure cases, racial bias in enforcement was frequently center stage.<sup>56</sup>

Consider first the possibility that the Supreme Court believed, rightly or wrongly, that cars had transformed policing. There are some limitations on our ability to determine whether this is true: the Supreme Court had mentioned the Fourth Amendment in only a handful of opinions by 1900, and police officers only in another small handful, with little overlap between the two groups of cases.<sup>57</sup> Before the turn of the century, the Court’s few extensive discussions of the Fourth Amendment had concerned neither search nor seizure, as we use those terms today to describe police actions, but instead subpoenas or other efforts to compel testimony or the production of evidence.<sup>58</sup> Thus, although police existed in the nineteenth century, as did racialized laws, there was no significant federal constitutional law of policing.<sup>59</sup>

55. See *Coolidge v. New Hampshire*, 403 U.S. 443, 462 (1971).

56. See, e.g., Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48 & nn.1–2 (2000) (citing cases).

57. Most famous among the nineteenth-century Fourth Amendment opinions is *Boyd v. United States*, 116 U.S. 616 (1886). Most famous among the nineteenth-century opinions that mention police officers is probably *Plessy v. Ferguson*, 163 U.S. 537 (1896). We remember *Plessy* as the shameful moment when the Supreme Court upheld racial segregation under the doctrine of “separate but equal.” We remember less well that *Plessy* was a criminal law case: the Louisiana law requiring segregation imposed criminal penalties, and it was a police officer who arrested Homer Plessy in 1892. See *id.* at 538–39.

58. See, e.g., *In re Chapman*, 166 U.S. 661, 672 (1897) (compelled testimony to grand jury not a Fourth Amendment violation); *Brown v. Walker*, 161 U.S. 591, 610 (1896) (same); *Boyd*, 116 U.S. at 638. The earliest instance in which any member of the Supreme Court contemplated a Fourth Amendment restriction on a person’s arrest appears to be *Fong Yue Ting v. United States*, an unsuccessful 1893 challenge by Chinese laborers to the Chinese Exclusion Act. 149 U.S. 698 (1893). In a strong dissent, Justice Field declared that nearly “[e]very step” of the law “tramples upon some constitutional right. Grossly it violates the Fourth Amendment . . . . The act provides for the seizure of the person without oath or affirmation or warrant, and without showing any probable cause . . . .” *Fong Yue Ting*, 149 U.S. at 760 (Field, J., dissenting). But the majority upheld the law as within Congress’s prerogative to exclude or expel aliens as deemed necessary for the public interest. See *id.* at 723–24 (majority opinion).

59. Seo argues that courts had not addressed the Fourth Amendment, or analogues in state constitutions, before national Prohibition because neither federal nor state law enforcement officials conducted many searches before then. P. 116. This explanation does not address the Amendment’s prohibition of *seizures*, nor does it acknowledge that nineteenth-century state-level regulation of liquor included sometimes controversial authorizations of broad search and seizure powers. See, e.g., NOVAK, *supra* note 3, at 179–83. In 1854 the Massachusetts Supreme Judicial Court struck down portions of state liquor law as violating the state constitution’s search and seizure provision. *Fisher v. McGirr*, 67 Mass. (1 Gray) 1 (1854). Of course, Seo is correct that there were many fewer federal law enforcement agents in the nineteenth century than the twentieth, and fewer local police officers as well. But I suspect that

Fast-forward two decades into the twentieth century, when cars were becoming an increasingly common feature of American life. At the same moment, the nation decided that longstanding state and local regulations of drink and drinking were insufficient to address the evils of liquor.<sup>60</sup> The Eighteenth Amendment was ratified in 1919 and banned the manufacture, sale, and transportation of liquor. Congress passed the Volstead Act in 1919 to enable federal officials to enforce the ban.<sup>61</sup> Soon thereafter, Prohibition agents stopped George Carroll in his Oldsmobile Roadster, searched it, and seized either sixty-eight or seventy-three bottles of liquor (pp. 113–14). (With dry wit, so to speak, Seo observes that between the stop and the indictment, five bottles “seem to have mysteriously disappeared” (p. 114).) The government later defended the warrantless search as necessary to the regulation of a novel “dangerous instrumentality.”<sup>62</sup> The Supreme Court (even Justice Brandeis, famous advocate of “the right to privacy”) ultimately agreed, and the “automobile exception” to the Fourth Amendment became law in 1925.<sup>63</sup>

That is the usual story, at any rate, and Seo does not question whether *Carroll v. United States* did in fact implement an “automobile exception.” But the Court itself has raised that question in at least two opinions, neither of which is discussed in *Policing the Open Road*.<sup>64</sup> *Carroll* itself did not refer to an “automobile exception” or indeed any automobile-specific rule of Fourth Amendment law. Instead, the Court relied on the text of the National Prohibition Act, and its legislative history, to distinguish between searches of

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changes in the law of constitutional remedies and changes in *lawyering* practices and strategies, rather than changes in police practices, help explain why constitutional challenges to police practices became so much more common in the twentieth century. Seo mentions the influence of exclusion as a remedy on page 119.

60. On state-level regulation of liquor long before national Prohibition, see NOVAK, *supra* note 3, at 171–89.

61. National Prohibition (Volstead) Act, ch. 85, 41 Stat. 305 (1919). See generally Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 840–45 (2004) (discussing the expansion of federal criminal enforcement after passage of the Volstead Act).

62. P. 128 (quoting Substituted Brief for the United States on Reargument, *Carroll v. United States*, 267 U.S. 132 (1925), 1924 WL 25788, at \*47).

63. Pp. 130–32, 138; see *Carroll*, 267 U.S. 132.

64. See *Coolidge v. New Hampshire*, 403 U.S. 443, 458–64 (1971) (considering, and rejecting, the argument that *Carroll* had held that “the police may make a warrantless search of an automobile whenever they have probable cause to do so”); *United States v. Di Re*, 332 U.S. 581, 584–88 (1948) (emphasizing that *Carroll* was based on an interpretation of the National Prohibition Act, and declining to decide “whether, without such Congressional authorization . . . any automobile is subject to search without warrant on reasonable cause to believe it contains contraband”). A quotation from Justice White’s *Coolidge* dissent is the epigraph to Chapter Three, p. 113, but the book offers no other mention of the case. This is surprising, most importantly because the majority opinion contains a lengthy discussion of whether there is indeed an “automobile exception,” but also because the *Coolidge* Court invoked the “everyman” trope that Seo discusses at length in Chapter Four. Pp. 169–74, 192, 196–97; *Coolidge*, 403 U.S. at 455.

dwellings and searches of *vehicles*.<sup>65</sup> The latter category included ships, motor boats, wagons, and other vessels—even sleds!—along with the automobile.<sup>66</sup> In sharp contrast to Seo's portrait of a Court awed by a novel technological innovation, the *Carroll* Court traced a distinction between dwellings and "movable vessels" to the nation's earliest days, to the First Congress that had adopted the Fourth Amendment.<sup>67</sup> And for decades after *Carroll*, no court mentioned an automobile exception, though lower courts and commentators did sometimes speak of a movable vehicle exception.<sup>68</sup> To be sure, this exception was in fact applied to automobiles far more than any other vehicle, and it is unsurprising that with the passage of time "the *Carroll* doctrine"<sup>69</sup> would be renamed "the automobile exception."<sup>70</sup> It is possible, too, that one or more individual justices in the *Carroll* majority understood the automobile, and the Court's reasoning, as novel; much of Seo's analysis focuses on biographical details or private papers of Chief Justice Taft and Justice Brandeis (pp. 130–32, 138). According to the published *Carroll* opinion, though, the automobile was just another movable vehicle, and its Fourth Amendment protection could be determined by investigation into tradition,

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65. E.g., *Carroll*, 267 U.S. at 147 (noting congressional intent to distinguish between "private dwellings" and "automobiles and other road vehicles"); *id.* at 166 (McReynolds, J., dissenting) (emphasizing that the federal authorization of searches "has no special application to automobiles; it includes *any* vehicle").

66. *Id.* at 152 (majority opinion).

67. See *id.* at 151; *id.* at 153 ("[T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."); see also *Agnello v. United States*, 269 U.S. 20, 32 (1925) ("While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein."). *Agnello* was decided just a few months after *Carroll*, which the Court distinguished on the grounds that it involved an automobile rather than a dwelling. *Id.* at 31–32.

68. In Chapter Four, Seo discusses *Brinegar v. United States*, 338 U.S. 160 (1949), noting that the Court saw the facts in *Brinegar* as very similar to those in *Carroll*. Pp. 163–64. The lower courts in *Brinegar* had not mentioned an "automobile exception" or even cited *Carroll* at all. See *Brinegar*, 338 U.S. at 164 n.3. A Westlaw search indicates that no court used the phrase "automobile exception" until 1971. See *supra* note 64 (discussing *Coolidge*). For references to a movable vehicle exception, see, for example, *State v. Findlay*, 145 N.W.2d 650, 656 (Iowa 1966), and Recent Case, 79 HARV. L. REV. 677, 678 (1966).

69. See, e.g., *United States v. Walker*, 307 F.2d 250, 252–53 (4th Cir. 1962) (applying "the *Carroll* doctrine" to the search of a truck); see also *Armada v. United States*, 319 F.2d 793, 797 (5th Cir. 1963) (applying "the *Carroll* doctrine" to the search of a car (quoting *Walker*, 307 F.2d at 252)).

70. Eventually, in the 1970s and 1980s, the Court began to use that term, and at that point it did identify automobiles as distinct in regard to reasonable expectations of privacy. See, e.g., *United States v. Chadwick*, 433 U.S. 1, 6–7 (1977).

history, and original understandings.<sup>71</sup> It is strange indeed to characterize as “the logic of *Carroll*” the view “that the transformations in modern America necessitated a new relationship between citizens and the police” (p. 155).

The automobile was not treated as a singular new invention by the *Carroll* Court, but it was unquestionably the vehicle that brought the Fourth Amendment to the Supreme Court in the early twentieth century, in the age of Prohibition.<sup>72</sup> Thus, it is certainly plausible that the Court did not initially think of the Fourth Amendment in relation to racial discrimination. African Americans did not drive or use cars widely until after World War II, Seo reports (p. 32). That does not mean that African Americans were not policed, of course; it just means that the policing of this group would not have presented itself in the Court’s first automobile search cases.

Still, one wonders whether the justices that built Fourth Amendment doctrine were as blind to the prospect of racialized law enforcement as Seo suggests. Even if George Carroll and other defendants raising Fourth Amendment claims were white drivers, the issue of racial bias in criminal law came to the Court in other ways. By 1920, five years before *Carroll v. United States* was decided, the Court had overturned state court criminal convictions in four cases, each addressing racial discrimination in jury selection.<sup>73</sup> Over the next two decades—as (white) America became increasingly motorized—the Court decided six more “landmark state criminal procedure cases,” four of which involved black defendants who had been sentenced to death in southern states after “egregiously unfair trials.”<sup>74</sup> Two of those cases, *Powell v. Alabama* and *Norris v. Alabama*, reversed convictions of the “Scottsboro Boys,” black young men convicted of raping two white women, on charges later determined to be fabricated.<sup>75</sup> Based on these cases and others, Michael Klarman has emphasized “the racial origins of modern criminal procedure.”<sup>76</sup> Focusing on cases decided somewhat later, Tracey Meares and Dan Kahan have similarly claimed that “[t]he context that gave rise to modern criminal procedure was institutionalized racism.”<sup>77</sup>

71. Indeed, *Carroll* has been held up as an example of originalist reasoning, though some scholars question whether the *Carroll* Court correctly interpreted original understandings of the Fourth Amendment. See Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 506 & nn.130–32 (2011) (citing sources).

72. I am assuming, as does Seo, that the Fourth Amendment cases the Court decided to hear are roughly representative of the Fourth Amendment cases it was asked to hear. I have not surveyed early twentieth-century petitions for writs of certiorari to see how often nondrivers tried to bring Fourth Amendment claims to the Supreme Court in that era.

73. See Klarman, *supra* note 56, at 48 & n.1 (citing cases).

74. *Id.* at 48, 50 (discussing *Moore v. Dempsey*, 261 U.S. 86 (1923); *Powell v. Alabama*, 287 U.S. 45 (1932); *Norris v. Alabama*, 294 U.S. 587 (1935); and *Brown v. Mississippi*, 297 U.S. 278 (1936)).

75. *Norris*, 294 U.S. 587; *Powell*, 287 U.S. 45; see also Klarman, *supra* note 56, at 51.

76. Klarman, *supra* note 56.

77. Dan M. Kahan & Tracey L. Meares, Foreword, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1156 (1998).

Seo cites these scholars as foil to her claim that “American courts did more to encourage and sustain, rather than to check, the police’s growing authority.”<sup>78</sup> But whether modern criminal procedure originated as an effort to address racial bias is, of course, a slightly different question than whether courts have, overall, done more to encourage police authority than to curtail it. In my view, both claims have merit: key early criminal procedure decisions were indeed a response to egregious racial discrimination (often at the trial stage rather than in policing), *and yet* courts have generally done more to license police authority than to constrain it. If indeed both claims are true, then it is harder to characterize Fourth Amendment doctrine as “racially innocent”; it is harder to conclude that the Court authorized broad police discretion without any inkling that it might result in discriminatory enforcement.<sup>79</sup>

I wish that Seo had made some effort to discuss criminal procedure beyond the Fourth Amendment, if only to highlight her intriguing observation that one widely held view of modern criminal procedure mostly excludes Fourth Amendment cases.<sup>80</sup> But I also think that the Scottsboro defendants, and other black defendants whose cases reached the Supreme Court in the first half of the twentieth century, create a problem for Seo’s thesis of non-intentionality that she should at least have addressed.<sup>81</sup> As suggested above, I am not sure we can now resolve the question whether the justices who created the doctrinal license of police discretion, or the prosecutors and others who argued for these doctrines, consciously intended to create opportunities for racialized enforcement. And I suspect our thinking about responsibility for racial inequality focuses too much on intent in any event.<sup>82</sup> Even if the decisionmakers who built the platform on which today’s racialized policing takes place were innocent of ill intention, the decisionmakers who maintain and operate on that platform today bear responsibility for their present actions. It is to today’s criminal legal system, and the question of responsibility for its injustices, that I now turn.

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78. P. 18; *see also* p. 284 n.24 (citing sources).

79. *Cf.* Murakawa & Beckett, *supra* note 9.

80. Klarman’s “racial origins” article does not address the Fourth Amendment, but Kahan and Meares do identify at least one Fourth Amendment case in their own argument that racial discrimination was the Court’s concern. *See* Kahan & Meares, *supra* note 77, at 1156. The case they cite, *Davis v. Mississippi*, involved a police roundup of sixty to seventy “Negro youths” for questioning, and sometimes arrest and fingerprinting, after a rape victim could give no description of her assailant other than that “he was a Negro youth.” 394 U.S. 721, 722 (1969).

81. As noted above, Seo cites Klarman and Kahan and Meares as exemplars of the view that the Court sought to “protect individual rights” rather than license discretion. Pp. 18, 284 n.24. But she does not mention any of the key cases upon which the “racial origins of criminal procedure” thesis is based.

82. This view is widely held among equality and discrimination scholars. For extensive citations to the relevant literature, *see* Eyer, *supra* note 11, at 1041–53.

## IV. LEARNING THE PAST TO CHANGE THE FUTURE

A book reviewer, like a historian or indeed any writer, has her own kind of discretion: even in nonfiction scholarly work, the writer will often have some leeway to decide what to emphasize. One can write a more flattering review, or a less flattering one, depending on the circumstances.<sup>83</sup> Here, I believe that the nation's grave need for a radically different approach to crime and punishment makes it important to identify the weaknesses of this book alongside its many strengths—much as I admire Seo and her other work, much as I expected to write a different review. *Policing the Open Road* is a fascinating study of midcentury legal thought, but it is an incomplete account of policing and constitutional doctrine. It offers an explanation for contemporary racial injustice based on a selective reading of both Supreme Court cases and the broader historical record. Though Seo seeks to inspire legal reform that could address racial inequality, that goal is likely to be undermined by this book: it's easy to see how an apologist for existing Fourth Amendment law could use her narrative to resist any substantial doctrinal change.<sup>84</sup> The apologist would invoke Seo's claim that the Court's endorsement of discretion was a rational, good-faith effort to deal with a real challenge to public safety, and he would argue that we should find better subconstitutional ways to ensure that police use discretion well, rather than compromise public safety by eliminating the discretion altogether.

More broadly, it is easy to imagine that this book will appeal to those who feel compelled to acknowledge racial inequality, but who fear radical legal change. The carceral state relies heavily on strategies of differentiation, from the fundamental distinction between criminal and noncriminal to the purported historical discontinuities used to separate today's racial inequalities from yesterday's. This book endorses those distinctions. It assumes that real criminals and "vagrants" really are different from ordinary, respectable, law-abiding, "nonvagrant" individuals. It also offers an explanation of contemporary racial inequalities that fully separates them from slavery and its aftermath. It is a story that I expect law enforcement and legal elites, from police chiefs and prosecutors to Supreme Court justices and their former clerks, to welcome as an alternative to more damning critiques. It is history

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83. See, e.g., Alice Ristroph, *The Definitive Article*, 68 U. TORONTO L.J. 140 (2018) (reviewing LINDSAY FARMER, *MAKING THE MODERN CRIMINAL LAW: CRIMINALIZATION AND CIVIL ORDER* (2016)); Alice Ristroph, *Professors Strangelove*, 11 GREEN BAG 2D 243 (2008) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007)).

84. Seo makes few specific suggestions for reform, but she seems to endorse William Stuntz's view that the Court took an approach that emphasized "procedure" too much and neglected "substance." E.g., p. 275. See generally STUNTZ, *supra* note 5, at 1–7. Without a clear statement of what the appropriate "substantive" rule would look like, it is difficult to evaluate the likely merits of such an approach. For my own part, I think twentieth-century scholars have been misled by the conceptual procedure/substance distinction. See Ristroph, *Intellectual History*, *supra* note 20.

as seen by August Vollmer, celebrated police chief of Berkeley. Green Cottenham is invisible in it.

“[T]hings have changed dramatically,” wrote Chief Justice Roberts in 2013, in a Supreme Court opinion that struck down part of the Voting Rights Act at the request of Shelby County, Alabama—the same jurisdiction where, 105 years earlier, Green Cottenham had been arrested and convicted for vagrancy before he was leased to a mining company and forced to labor until his death a few months later.<sup>85</sup> And of course, many things have changed dramatically—it was not difficult for the Chief Justice to marshal both statistical evidence and anecdotal examples of progress toward racial equality.<sup>86</sup> Other things, such as profound racial disparities in the distribution of wealth and power, and in the distribution of the burdens of criminal law, have been around for a long time. Throughout his *Shelby County* opinion and in other cases addressing racial inequality, the Chief Justice has emphasized discontinuity between past and present to put the Constitution in the way of efforts to achieve greater racial equality.<sup>87</sup> He is hardly unique among judges in that regard. Given the composition of the American judiciary, I do not know whether constitutional doctrine can be a useful lever for those who seek to end gross racial oppression in American criminal law. But for there to be any hope that constitutional doctrine will help, Chief Justice Roberts and other judges must come to understand themselves as responsible for perpetuating that oppression. Judges, along with everyone else, must learn criminal law’s history, especially its role in preserving racial hierarchy since the nation’s earliest days.

#### CONCLUSION

In brainstorming a title for this book review, “what is remembered” came to mind. Pleased with the sound of that phrase and briefly pleased with myself for coming up with it, I soon had a nagging sense that I had heard it somewhere before. Google revealed an Alice Munro short story with the same title.<sup>88</sup> It is about an isolated infidelity by a young wife and the way she

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85. *Shelby County v. Holder*, 570 U.S. 529, 547 (2013); BLACKMON, *supra* note 12, at 1, 321–23.

86. *Shelby County*, 570 U.S. at 548–49 (noting the twenty-first-century election of African American mayors in two cities where police or local citizens had used violence against civil rights activists in the 1960s).

87. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (finding that because a formerly segregated school district had been deemed to achieve “unitary status,” the goal of maintaining diverse schools could not justify its race-conscious student placement policy).

88. Alice Munro, *What Is Remembered*, NEW YORKER (Feb. 19, 2001), <https://www.newyorker.com/magazine/2001/02/19/what-is-remembered> [https://perma.cc/FD8A-U9CH]. I’m fairly sure I’d never read that story before my work on this Review, but still later I realized that I *had* once read still another Alice, Alice B. Toklas, who titled her memoir of her life with Gertrude Stein, “What Is Remembered.” ALICE B. TOKLAS, WHAT IS REMEMBERED (1963).

subsequently treasures the memory of the encounter during her long, happy, and apparently otherwise monogamous marriage.<sup>89</sup> Only after her husband has died does the woman remember, for the first time, one additional detail from that adulterous afternoon, now decades in the past. And she realizes that had she recalled that seemingly minor detail from the beginning, it could have ended her marriage and changed her life.

We humans are nostalgic creatures but also forgetful, and it so happens that we often forget or remember in ways that serve our own interests. Some memory lapses are harmless, but some lapses have profound consequences for other people. When the interests of others are at stake, it is important to go back and look. We will forget to do so, and so we must remind each other to go back and look. And when we go back and look, we may see only what we want to see. We may notice only the aspects of the past that fit the narrative we want to believe. We have no option but to try to do better, and to call upon one another for help. Recovering our history should be a collective endeavor, one in which we listen especially carefully for the voices of marginalized groups who have not been privileged to write the histories already familiar to us. Sarah Seo is a gifted historian whose work can become an important part of this effort to put mass incarceration in historical context. But her work must itself be put in context, and readers must go back and look where midcentury jurists, or Seo, did not. Read this book to enrich your understanding of midcentury legal thought, but resist its invitation to view discretionary, racialized criminal law enforcement as an accidental byproduct of the automobile.

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89. Adultery, fornication, and other erstwhile offenses of sexual impropriety are additional examples of crimes that produced widespread lawbreaking long before the automobile. That's not to deny that the automobile may have made some of these offenses easier to consummate.



